

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

PORTLAND DIVISION

RANDELL KERBY and CHERYL KERBY,
in her individual capacity and on behalf of her
minor children, J.R.K. (1) and J.R.K. (2)

No. 2:12-cv-00544-MO

OPINION AND ORDER

Plaintiffs,

v.

GAY DAVIS, in her individual and official
capacity,

Defendant.

MOSMAN, J.,

On April 23, 2015, Defendant filed her supplemental pleading [250], identifying the information and/or documents known to Defendant Davis upon which Defendant's expert witness, Corey Jewell Jensen, bases her opinion. The following are the court's findings:

	Ms. Jensen's Basis for Opinion #1 (as stated in expert report)	Defendant Davis's Knowledge of Same	Court's Ruling
A.	Victim's disclosure of multiple incidents of sexual abuse (including vaginal penetration) by Randell Kerby and the consistency of the victim's disclosures in more than one interview setting	<p>"Q. Did there come a time when you reviewed the DHS file for the Kerby family? A. Yes." [except adoption file] Davis Depo., 3/18/2014, 29:16-18.</p> <p>"Q. [plaintiffs' counsel asking about 2011 founded assessment for J.S.K. abuse]1 Ms. Davis, do you recall this document? A. I've seen it, yes. Q. And would you tell me what it is? A. It's a – It's an assessment on the sex abuse.</p>	Admitted

	<p>The victim was [J.S.K.].” Davis Depo., 3/18/2014, 35:13-18.</p> <p>“Q. [plaintiffs’ counsel asking about J.S.K. Guardian Care Center Interview] Have you had a chance to review this document? A. I have not read – I haven’t read it today, but I know that I have reviewed [J.S.K.’s] Guardian Care interview.” Davis Depo., 3/18/2014, 46:25-47:4.</p> <p>“Q. In early 2011, did you believe that [J.S.K.] had been sexually abused? A. Yes. Q. And why did you believe that? A. Because she told me.* * * A. Because I saw [J.S.K.] I saw how upset she was. The behaviors that align with someone that’s been sexually abused.” Davis Depo., 3/18/2014, 42:22-43:8.</p> <p>“Q. Could you turn back to [J.S.K. Guardian Care Center interview]. Does this refresh your recollection about when the alleged rape by Randy Kerby against [J.S.K.] was supposed to have taken place? A. Well, there was numerous, from what I remember, numerous times.* * * Well, I was just trying to answer. I was reading on the page before that. I asked if anything else had ever happened besides the touching from age six to 14 years old, and [J.S.K.] said “Yes.” I asked how it transitioned at age 14, and [J.S.K.] said that her dad told her that if she did not love him, and if she did love him, that she would show him during sex. She said she finally broke down in the bathroom.” Davis Depo., 3/18/2014, 105:18-106:18.</p> <p>“Ms. Davis... will testify regarding... her conversations with J.S.K. in which J.S.K. reported to her that Randell Kerby was starting to take an interest in J.R.K.(1) and that was why J.S.K. came forward and reported the abuse when she did ... and the</p>	
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		founded disposition letter dated March 17, 2011 (Exhibit 510).” Defendant’s Supplemental Witness Statement, pp. 2, 4.	
B.	The victim’s statement where Randell Kerby’s semen would be found on her bedroom floor, the semen being found on the victim’s bedroom floor where the victim reported it would be found from a recent sexual abuse of the victim by Randell Kerby	<p>“Q. Did there come a time when you reviewed the DHS file for the Kerby family? A. Yes.” [except adoption file] Davis Depo., 3/18/2014, 29:16-18.</p> <p>“Q. [plaintiffs’ counsel asking about 2011 founded assessment for J.S.K. abuse] Ms. Davis, do you recall this document? A. I’ve seen it, yes.</p> <p>Q. And would you tell me what it is? A. It’s a – It’s an assessment on the sex abuse.</p> <p>The victim was [J.S.K.]” Davis Depo., 3/18/2014, 35:13-18.</p> <p>“Ms. Davis... will testify ... [she] was aware ... that Randell Kerby’s semen was found on J.S.K.’s bedroom floor exactly where she said it would be from one of the incidents of Randell Kerby’s rape of her and that this semen was tested and found to be semen and matched Randell Kerby’s DNA... and the founded disposition letter dated March 17, 2011 (Exhibit 510).” Defendant’s Supplemental Witness Statement, pp. 3-4.</p>	<p>Under Advisement</p> <p>The Court will hold a pre-testimony mini-hearing on the section in bold lettering.</p>
C.	The state crime lab’s testing of the semen sample taken from the victim’s bedroom floor that returned a match with the DNA of Randell Kerby	<p>“Q. Did there come a time when you reviewed the DHS file for the Kerby family? A. Yes.” [except adoption file] Davis Depo., 3/18/2014, 29:16-18.</p> <p>“Q. [plaintiffs’ counsel asking about 2011 founded assessment for J.S.K. abuse] Ms. Davis, do you recall this document? A. I’ve seen it, yes. Q. And would you tell me what it is? A. It’s a – It’s an assessment on the sex abuse. The victim was [J.S.K.]” Davis Depo., 3/18/2014, 35:13-18.</p> <p>“Ms. Davis... will testify ... [she] was aware ... that Randell Kerby’s semen was found on J.S.K.’s bedroom floor exactly where she said it would be from one of the incidents of Randell Kerby’s rape of her</p>	<p>Under Advisement</p> <p>The Court will hold a pre-testimony mini-hearing on the sections in bold lettering.</p>

		and that this semen was tested and found to be semen and matched Randell Kerby's DNA... and the founded disposition letter dated March 17, 2011 (Exhibit 510)." Defendant's Supplemental Witness Statement, pp. 3-4.	
D.	Randell Kerby's inconsistent or questionable statements during law enforcement's investigation	[defendant not relying upon this factor]	Withdrawn
E.	Randell Kerby's failure of a polygraph test administered by a certified polygrapher from the Oregon State Police	<p>"Q. Did there come a time when you reviewed the DHS file for the Kerby family? A. Yes." [except adoption file] Davis Depo., 3/18/2014, 29:16-18.</p> <p>"Q. [plaintiffs' counsel asking about 2011 founded assessment for J.S.K. abuse] Ms. Davis, do you recall this document? A. I've seen it, yes. Q. And would you tell me what it is? A. It's a – It's an assessment on the sex abuse. The victim was [J.S.K.]" Davis Depo., 3/18/2014, 35:13-18.</p> <p>"Ms. Davis... will testify ... [she] was aware ... that Randell Kerby failed a polygraph test during the criminal investigation... and the founded disposition letter dated March 17, 2011 (Exhibit 510)." Defendant's Supplemental Witness Statement, pp. 3-4.</p>	Admitted
F.	Randell Kerby's interactions with DHS and law enforcement	[defendant not relying upon this factor]	Withdrawn
G.	Randell Kerby's failure or refusal to complete a psychosexual evaluation	<p>"Q. Did there come a time when you reviewed the DHS file for the Kerby family? A. Yes." [except adoption file] Davis Depo., 3/18/2014, 29:16-18.</p> <p>"Q. [plaintiffs' counsel asking about Letter of Expectation] A. It's a Letter of Expectation. * * * Q. And is there a reason that you completed this form on approximately, it looks like the letter was prepared on October 13th, 2011, even though [J.S.K.] had been in DHS custody as often as January, the end of January 2011? A. It's because Randell was not doing what</p>	Admitted

		<p>was asked of him to be able to return home to [J.R.K.(1) and J.R.K.(2)]. * * *</p> <p>Q. And what was DHS asking of him before this Letter of Expectation?</p> <p>A. The same thing, to do a psychosexual and the follow up. And follow all recommendations made by the clinical psychologists.</p> <p>Q. And how were those recommendations transmitted to Randell Kerby prior to that October 13, 2011 Letter of Expectation?</p> <p>A. They were – I sent out – I can’t think of what the document’s called, and told – He was told that, also. * * *</p> <p>Q. So you believe before this Letter of Expectation was sent to Randell Kerby, he had been told –</p> <p>A. Yes.</p> <p>Q. – about what was expected of him?</p> <p>A. Yes.</p> <p>Q The same thing that is in this letter?</p> <p>A. Yes.”</p> <p>Davis Depo., 3/18/2014, 91:2-93:2.</p> <p>“Ms. Davis... will testify ... [she] was aware ... that Randell Kerby ... was requested by DHS but was refusing to complete a psychosexual evaluation (which Ms. Davis agreed was a good idea and standard in these types of cases)... [and] the content of the following ...: the J.S.K. August 2011 case plan which was timely prepared based on the DHS practices as of 2011 and the case plan’s discussion of the DHS request that Randell Kerby complete a psycho-sexual evaluation (Exhibit 512) which was reviewed and approved by the Citizens’ Review Board... the March 16, 2011 meeting including Randell and Cheryl Kerby and Cheryl Kerby’s attorney Kittee Custer and Val Gawf and Janelle Dunlap in which the Kerbys were told the services that DHS wanted them to complete for J.S.K.’s return within a year including a psycho-sexual evaluation by Randell Kerby...; and the</p>	
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		founded disposition letter dated March 17, 2011 (Exhibit 510).” Defendant’s Supplemental Witness Statement, pp. 3-4.	
H.	Randell Kerby’s past founded disposition for physical abuse of his adopted son (victim’s younger brother)	<p>“Q. Did there come a time when you reviewed the DHS file for the Kerby family? A. Yes.” [except adoption file] Davis Depo., 3/18/2014, 29:16-18.</p> <p>“Q. [plaintiffs’ counsel asking about 2007 founded disposition] A. I do remember somewhere reading that Randell slapped [J.R.K.(2)], and this one shows it because it was a, I believe there was a founded for him slapping [J.R.K.(2)] and leaving a mark. So, whether I read this exact assessment, I can’t answer that. Q. But this is in the format that assessment at DHS— A. Yes. Q. – for normally— A. Yes. Q. And you recall a founded disposition with respect to a slap – A. Yes. Q. – with [J.R.K.(2)]? A. Yes.” Davis Depo., 3/18/2014, 33:17-34:7.</p> <p>“Ms. Davis... will testify ... [she] was aware ... that Randell Kerby had other founded and unfounded dispositions with DHS (2003, 2007, 2011 pool visit incident)...” Defendant’s Supplemental Witness Statement, p. 3.</p>	Admitted

DATED this 29 day of April, 2015.

/s/ Michael W. Mosman

MICHAEL W. MOSMAN
United States District Judge